## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)
Plaintiff,	)
	) Civil Action
V.	No. 99-2496 (GK)
PHILIP MORRIS INCORPORATED, et al.	) Next scheduled court appearance ) 5/26/00
Defendants.	)

## UNITED STATES' OPPOSITION TO MOTION OF B.A.T INDUSTRIES P.L.C. TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION

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The United States of America hereby submits, by and through its undersigned attorneys, the following memorandum in opposition to the motion to dismiss for lack of personal jurisdiction filed by B.A.T Industries p.l.c. <sup>1</sup>

#### **PREFACE**

Eight weeks ago, the United States District Court for the Eastern District of New York issued an eighty-seven page opinion detailing the nature of the contacts that defendant B.A.T Industries p.l.c. ("BAT") has had with the United States and the extent of its involvement in a conspiracy, along with the other defendants in this case, to defraud the American public through material misrepresentations concerning, inter alia, the health effects of smoking and the addictiveness of nicotine. Simon v. Philip Morris, Inc., No. 99CV1988, 2000 WL 21114 (E.D.N.Y. Jan. 4, 2000). Judge Weinstein's opinion, attached at Tab B, carefully lays out the substantial evidence publicly available about BAT's involvement.

The law of this jurisdiction makes clear that a nonresident defendant such as BAT is subject to the jurisdiction of this Court when that nonresident defendant participates in a conspiracy with others who are subject to the Court's jurisdiction, and one of these coconspirators commits at least one overt act in furtherance of the conspiracy in the District. This case presents a situation where (1) BAT is alleged to have participated in a conspiracy that had devastating impact in the District of Columbia; (2) numerous overt acts in furtherance of the conspiracy were perpetrated and caused injury in the District; (3) none of BAT's co-conspirators contests jurisdiction; and (4) BAT has been acutely aware of the harm caused by the conspiracy

The United States originally named British American Tobacco p.l.c. ("British American") in its Complaint as successor in interest to B.A.T Industries p.l.c. because of a corporate reorganization that occurred in late 1998. Allegations of the Complaint made against British American are presumed to have been made against B.A.T Industries p.l.c by virtue of the Court's December 17, 1999 Order granting the Joint Motion of the Plaintiff and All Defendants for Dismissal and Substitution of Parties.

it furthered, and, therefore cannot now claim to be surprised that it is being called to answer in this Court for its conduct.

#### I. INTRODUCTION

In 1976, BAT assumed control of a tobacco conglomerate consisting of hundreds of tobacco subsidiaries around the world, internally referred to as the "BAT Group." Since that time, BAT has conspired with the other defendants named in this case to, among other things, defraud the public about the health effects of smoking, suppress development of a safer cigarette, manipulate and control the dissemination of scientific information contrary to the defendants' public positions, and falsely deny that smoking is addictive. As alleged throughout the Complaint, BAT has purposefully and knowingly engaged in this course of fraudulent, tortious, and illegal conduct in concert with all of the defendants, including its own subsidiaries, defendants British American Tobacco (Investments) Ltd. ("BATCo.") and Brown & Williamson Tobacco Corporation ("B&W").

In connection with this Memorandum, the United States submits an affidavit supported by a Proffer of Publicly Available Evidence ("Proffer") (attached at Tab A). This Proffer summarizes 266 exhibits that are accessible in document depositories, public court files, on the Internet, and are from other public resources (attached at Tab A as Ex. 1 through Ex. 266). The facts contained in this Proffer demonstrate that the prima facie test applicable at this stage of the

Prior to the corporate reorganization which created B.A.T Industries, p.l.c. ("BAT") in 1976, the ultimate parent of the BAT Group of companies was defendant British American Tobacco (Investments) Ltd. (known at the time as British American Tobacco Company, or "BATCo."). BATCo. had been the ultimate parent of the BAT Group of companies for the half century until the creation of BAT in 1976. BATCo. was defendant Brown and Williamson's ultimate parent prior to 1976, and, after 1976, was a subsidiary of BAT. Defendants BATCo. and B&W (the former a British corporation, the latter United States affiliate of a British corporation) do not contest this Court's exercise of personal jurisdiction. Only defendant BAT contests personal jurisdiction. Proffer at III.A.

proceedings for this Court's exercise of personal jurisdiction over BAT is well satisfied. They also demonstrate that the allegations of the Complaint against BAT are well supported in the public record.

BAT is properly subject to jurisdiction in this Court under four independent theories of personal jurisdiction, all of which arise from application of the District of Columbia long-arm statute, D.C. Code § 13-423. First, BAT, as a member of the defendants' conspiracy, is subject to jurisdiction in the District of Columbia under section 13-423(a)(1) because BAT's coconspirators transacted business in the District of Columbia and committed numerous overt acts in furtherance of the conspiracy there. Second, BAT acquired and maintained the viability of various brands formerly owned by the American Tobacco Company. These brands were marketed and sold in the District of Columbia, and therefore BAT is directly subject to jurisdiction as having "transact[ed] . . . business in the District of Columbia" under section 13-423(a)(1). Third, BAT is subject to suit in the District under section 13-423(a)(3), based on its co-conspirators' commission of tortious acts in furtherance of the conspiracy, that both occurred and caused tortious injury in the District of Columbia. Finally, BAT is directly subject to this Court's jurisdiction under section 13-423(a)(4) because BAT has committed tortious acts outside the District of Columbia, which caused tortious injury in the District of Columbia, and because BAT derives substantial revenue from cigarettes marketed and sold in the District.

Additionally, a finding that BAT is amenable to suit in the District of Columbia comports fully with the Due Process Clause of the United States Constitution. In light of the magnitude of the conspiracy alleged in this case and the devastating effects the conspiracy had in the District of Columbia, there can be no question that BAT's participation in the conspiracy makes it amenable to this Court's jurisdiction. Furthermore, it is eminently reasonable for this Court to require BAT, a sophisticated international conglomerate, to answer for its participation in a

conspiracy that was furthered in and substantially affected the District of Columbia.

BAT's opening brief trumpets opinions of courts that have granted BAT's motions to dismiss for lack of personal jurisdiction.<sup>3</sup> There is no question that at present there are more written opinions dismissing BAT than there are those that exercise jurisdiction over it. But counsel for the United States is not aware of any court that has dismissed BAT on personal jurisdiction grounds where the developed public record of BAT's participation in a wide-ranging conspiracy, as alleged in the United States' Complaint, has been presented to a court in a forum, such as this one, which fully recognizes jurisdiction premised on the actions of co-conspirators.

See, e.g., Simon v. Philip Morris, Inc., No. 99CV1988, 2000 WL 21114 (E.D.N.Y. Jan. 4, 2000). Based on the publicly available facts and the caselaw of this District, this Court may--and should--exercise jurisdiction over BAT. In the alternative, the United States respectfully

BAT has attached to its Motion to Dismiss twenty-seven cases in which BAT has been dismissed on jurisdictional motions. See BAT Mem., Exhs. A - DD. Many bases for dismissal in those cases are not applicable to this litigation. Some of these decisions held that state law had not endorsed the conspiracy theory of personal jurisdiction; however, the District of Columbia does recognize the conspiracy theory. See, e.g., Varghese v. R.J. Reynolds Tobacco Co., No. 99-10026-GAO (D. Mass. Aug. 18, 1999); Insolia v. Philip Morris Inc., 31 F. Supp.2d 660 (W.D. Wis. 1998); Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp.2d 796 (N.D. Ohio 1998); State of Idaho v. Philip Morris, Inc., No. CV-OC-97-03239 (Idaho Dist. Ct. July 31, 1998). Some of the courts dismissed BAT because plaintiffs had failed to pierce the corporate veil or prove that BAT's alter ego was B&W; in the present case, the United States is not arguing alter ego or corporate veil-piercing theories. See, e.g., Insolia v. Philip Morris, Inc., 31 F. Supp.2d 660 (W.D. Wis. 1998); Arch v. American Tobacco Co., 984 F. Supp. 830 (E.D. Pa. 1997); State of Oregon v. American Tobacco Co., No. 9706-04457 (Or. Cir. Ct. Feb. 13, 1998); State of Florida v. American Tobacco Co., No. CL-95-1466 (Fla. Cir. Ct. Sep. 16, 1996). In yet other cases, the courts found that plaintiffs had not set forth sufficient allegations to meet the requisite burden and standard of proof in a particular state. But, in the present case, as discussed above, the United States has made the requisite prima facie showing under the District of Columbia's long-arm statute and the conspiracy jurisdiction theory by alleging specific and detailed jurisdictional facts in both the Complaint and the Proffer. See, e.g., Varghese v. R.J. Reynolds Tobacco Co., No. 99-10026-GAO (D. Mass. Aug. 18, 1999); Lyons v. Philip Morris, Inc., No. 98-515 (D. Minn. Apr. 1, 1999); Clay v. American Tobacco Co., No. 97cv4167 (S.D. Ill. Nov. 13, 1998); Laborers Local 17 Health & Benefit Fund v. Philip Morris Inc., 26 F. Supp.2d 593 (S.D.N.Y. 1998), vacated on other grounds, 191 F.3d 229 (2d Cir. 1999).

requests that it be given an opportunity to commence jurisdictional discovery.

#### II. STATEMENT OF FACTS

### A. Allegations of The Complaint

BAT is a British corporation with its principal place of business in London. Compl. ¶ 18. BAT has "individually and through its agents, alter egos, subsidiaries, or divisions . . . materially participated" in an enterprise as defined in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and "materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful, misleading, and fraudulent conduct alleged." Id. As further alleged, BAT has conspired to conduct and participate in the RICO enterprise, pursuant to 18 U.S.C. § 1962(d). Id. ¶¶ 200-203. BAT has also participated in a civil conspiracy with the other defendants and with persons known and unknown for multiple purposes, including (a) concealing knowledge of the harmful effects of cigarette smoking, (b) creating and perpetuating an "open controversy" about the health effects of smoking when it knew that no such controversy existed, and (c) maintaining a market for defective and unnecessarily dangerous products. Id. ¶ 161.

BAT is the sole shareholder of defendant B&W and is the ultimate parent company of defendant BATCo. <u>Id.</u> ¶ 18. Through the American Tobacco Company ("American Tobacco"), BAT "has placed cigarettes into the stream of commerce with the expectation that substantial sales of cigarettes would be made in the United States, including in the District of Columbia." Id.

The United States further alleges that BAT, in concert with the other defendants, has engaged in a course of conduct that has caused cigarette smokers to suffer dangerous disease and injury. <u>Id.</u> ¶ 6. In conspiracy with the other defendants, BAT has long denied the harmful health effects caused by smoking, despite its longstanding possession of knowledge to the contrary. <u>Id.</u>

¶ 3. Similarly, BAT has denied that cigarettes are addictive even though it has long known of and attempted to exploit the addictive properties of nicotine. <u>Id.</u> To avoid discovery of and accountability for its fraudulent conduct, BAT has concealed material information, documents, and research that would expose its unlawful activities to additional public scrutiny. <u>Id.</u> ¶ 5.

More specifically, the United States alleges that BAT controlled and directed research of its subsidiary, defendant BATCo., on smoking, disease, and addiction, and utilized its position as an overseas parent to B&W to keep potentially damaging documents, research, and information out of reach of courts and others in the United States. <u>Id.</u> ¶¶ 41, 51. BAT also permitted itself or its subsidiaries to be recipients of sensitive and inculpatory documents that B&W sent to England to remove them from the United States. <u>Id.</u> ¶¶ 41, 52. Like other members of the enterprise, BAT has suppressed the development, testing, and marketing of less hazardous products. <u>Id.</u> ¶ 180.

BAT engaged in all of these activities in furtherance of an unlawful scheme or artifice to obtain money and property from members of the public by way of material false and fraudulent pretenses, representations, and promises. <u>Id.</u> ¶ 204. One way that BAT implemented this scheme to defraud was through use of mail and wire transmissions. <u>Id.</u> ¶¶ 55, 59, 101, 108.

BAT continues to profit from conspiracy and its unlawful conduct alleged by the United States, the effects of which continue to the present. <u>Id.</u> ¶ 6. Furthermore, BAT continues to engage in unlawful activity, and unless restrained, is likely to continue its harmful and illegal activities into the future. <u>Id.</u> ¶¶ 6, 207-210.

### B. Evidence in The Public Record of BAT's Participation in The Conspiracy

Attached at Tab A is an affidavit and evidentiary Proffer which supports this Court's exercise of personal jurisdiction over BAT. The United States has relied solely on publicly available evidence, including material contained in document depositories, in public court files,

on the Internet, and in other publicly accessible locations, to demonstrate in a non-exhaustive fashion BAT's active and knowing participation in the RICO and civil conspiracies that have been alleged in the Complaint, and to highlight some of the unlawful and tortious conduct in which BAT has engaged. No formal discovery has been taken in this case, although BAT voluntarily provided to the United States material that it had produced to the State of Texas in 1997 during the State of Texas' cost recovery action against BAT and other defendants, as well as six depositions of BAT employees that had been taken in various smoking and health and cost recovery litigation.

Although the allegations in the Complaint are sufficient in and of themselves to support the exercise of personal jurisdiction over BAT, the United States nonetheless submits the Proffer in order to set forth in greater detail the public record of BAT's tortious and conspiratorial conduct, and thereby to remove any doubt that BAT is amenable to this Court's jurisdiction.

Below is a summary of the publicly available evidence.<sup>4</sup>

To the extent that BAT attempts to controvert the facts gleaned from the public record, and were the Court to believe that the exercise of personal jurisdiction absolutely hinges on the interpretation of facts that are not fully developed in the public record, it would be appropriate for the Court to defer ruling on BAT's motion and permit discovery to proceed against BAT. See generally Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13 (1978) (discovery is available to ascertain facts bearing on jurisdictional issues). The D.C. Circuit has expressly recognized that it is an abuse of discretion to deny jurisdictional discovery where, as here, plaintiff has specifically alleged (i) the existence of a conspiracy; (ii) the nonresident's participation in the conspiracy; and (iii) an injury-causing act in furtherance of the conspiracy. Edmond v. United States Postal Serv. General Counsel, 949 F.2d 415, 425 (D.C. Cir. 1991); see also Edmond v. United States Postal Serv. General Counsel, 953 F.2d 1398, 1401 (D.C. Cir. 1992) (Ginsburg, J., concurring in denial of rehearing en banc) (fair opportunity for plaintiffs to pursue discovery keyed to issue of personal jurisdiction should have been allowed); Crane v. Carr, 814 F.2d 758 (D.C. Cir. 1987); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1089-90 (D.C. Cir. 1998) (citations omitted); GTE New Media Serv. Inc. v. Bellsouth Corp., 2000 WL 1388 (D.C. Cir. Jan. 11, 2000) (remanding GTE New Media Serv. Inc. v. Ameritech Corp., 21 F. Supp. 2d 27 (D.D.C. 1998), for jurisdictional discovery); cf. Naartex Consulting Corp. v. Watt, 722 F.2d 779, 787 (D.C. Cir. 1983), cert. denied, 467 U.S. 1210 (1984).

### 1. <u>BAT's Promotion Of The "Open Controversy"</u>

This evidence reveals that BAT promulgated a number of smoking and health "guidelines" (a euphemism for directives) to its worldwide subsidiaries in order to ensure that defendants maintained a unified front to promote the fraudulent "open controversy" of whether smoking was linked to disease. One illustrative example is the 1984 "Legal Considerations on Smoking and Health Policy " issued by BAT to its worldwide subsidiaries, including defendants BATCo. and B&W. This policy directive, later incorporated into the Statement of Business Conduct for all of BAT's worldwide subsidiaries, made clear what the public position of the BAT Group would be on whether smoking caused disease: "[A] genuine scientific controversy exists. The Group's position is that causation has not been proved and that we do not ourselves make health claims for tobacco products." Ex. 60; see generally Proffer at 13-22.

This policy directive was not the innocent statement of an uninvolved holding company that simply did not know (or had intentionally blinded itself) to the evidence that smoking did in fact cause disease. On the contrary, the head of the BAT Group's own research facility had made clear six years before the issuance of the "Group's position" on the open controversy:

There has been no change in the scientific basis for the case against smoking. Additional evidence of smoke dose-related incidents of some diseases associated with smoking has been published. <u>But generally this has long ceased to be an area for scientific controversy.</u>

Ex. 7 at Note 1 (Statement of S.J. Green) (emphasis added). Numerous other documents demonstrate BAT's clear knowledge that smoking caused disease and that nicotine was addictive. See generally Proffer at II.A-B.

BAT also orchestrated the development and publication of "scientific" reports that were similar in form and substance to "Special Projects" research undertaken in the United States -- knowingly false and misleading publications financed in secret by the defendants and

represented to be the work of disinterested researchers, but which always promoted the "open controversy" position. See Compl. ¶¶ 56-69. Such publications were intended to be, and were in fact, used publicly in attempts to discredit the scientific evidence linking smoking to disease.

BAT's development of the Compendium of Epidemiological Studies in the mid-1980's is a representative example of this type of publication. See generally, Proffer at 22-25.

The evidence also reveals that BAT conspired directly with both other members of the conspiracy with which it had no corporate affiliations, as well as with BAT Group coconspirators BATCo. and B&W. A particularly noteworthy example is BAT's reaction to Philip Morris advertisements in Holland, by which BAT believed Philip Morris was breaking ranks with its co-conspirators on the "open controversy" and jeopardizing the defendants' "cooperation" on smoking and health issues. The Chairman of BAT wrote to Philip Morris:

I find it incomprehensible that Philip Morris would weigh so heavily the short-term commercial advantage from deprecating a competitor's brand while weighing so lightly the long-term adverse impact from an on-going anti-smoking programme. I believe this is the first time a Tobacco Manufacturer has purchased space to promulgate the anti-smoking position. In doing so, Philip Morris not only makes a mockery of Industry co-operation on smoking and health issues, but also appears to inaugurate a free-for-all in which illegal conduct is condoned provided the commercial stakes are high enough. . . .

#### Ex. 58 (emphasis added).

BAT Group companies enjoyed the advantages of a worldwide network of research and development facilities, infrastructure, and research. This consolidation, however, came at a price: when one subsidiary developed research concluding that cigarettes were harmful, or that nicotine was addictive, or that a less hazardous cigarette could be developed, the other subsidiaries (and the entire BAT Group as a whole) were made aware of the results. BAT had not originally followed the example of some of its co-conspirators who had closely controlled their R&D departments to ensure that adverse scientific evidence of the relationship of smoking to disease was never created in their own files. Rather, BAT oversaw hundreds of subsidiaries

around the world, at least some of which created and maintained information that directly threatened the defendants' fraudulent public position that there was an "open controversy" about smoking and health. BAT understood that revelation of such information in civil discovery could be devastating to the Group's legal position in smoking and health litigation in the United States. Thus, BAT was involved in efforts to conceal such information from coming to light in the United States and redoubled efforts to prevent such information from being created in the first instance. See Proffer at 25-37.

Such concerns prompted BAT to subordinate science to management and public health to corporate profits. In 1986, when its Canadian affiliate, IMASCO, suggested research aimed at developing a less hazardous product, BAT Chairman Sir Patrick Sheehy wrote to IMASCO of his concern that BAT might be "by implication in danger of being interpreted as accepting that the current product is 'unsafe' and this is not a position that I think we should take." Ex. 255; Proffer at 28-29. Similar concerns prompted BAT to reorganize its research approach into two components. First, the internal branch was intended "to anticipate and meet either: consumer demand, or requirements of regulatory authorities." Ex. 107; see Proffer at 29-30. Second, the BAT Group Research Conference recommended that a "Scientific Advisory Group" be formed to keep track of external research, "to evaluate the quality of that research and any conclusions based upon it and, when in its view supplementary or clarifying work is required, to recommend the allocation of funds for that purpose." Ex. 107 at 6. Such a role, reminiscent of the "Special Projects" commissioned by the Council For Tobacco Research (as alleged in Compl. ¶¶64-68) illustrates BAT's view that science should take a secondary role to legal concerns.

Faced with the prospect that disclosure of BAT research "could prejudice B&W's chances of defending litigation," Ex. 126, BAT was confronted with B&W's insistence that this research should be thoroughly insulated from civil discovery. A 1979 memorandum from B&W

corporate counsel J. Kendrick Wells to Ernest Pepples, the Vice President and General Counsel of B&W, explained the steps necessary to prevent the disclosure of adverse BAT Group research: the research was to be sent to Pepples himself in the General Counsel's office, under a policy "which describes the purpose of developing the documents for B&W and sending them to [Pepples] as use for defense of potential litigation." Ex. 110 at 1. At the same time, the memorandum recognized that "Continued Law Department control is essential for the best argument for privilege. . . . The general policy should be clearly stated that access to the documents and storage of the documents is under control of the Law Department and access is granted only upon approval of request." Ex. 110 at 1-2 (emphasis added); see Proffer at 31-33. In late January 1985, Gerald L. Dennis of BAT forwarded to BATUS a procedure "just adopted" by BATCo "for clearing scientific and other documents which are sent outside the Group." Ex. 120 at 1. BATUS<sup>5</sup> president Henry Frigon (who later joined BAT) responded by assuring Dennis that he would review the procedure with B&W to ensure "our procedures are in line with this policy," Ex. 121 at 1. He then did so with B&W President Thomas Sandefur. Ex. 122. In his letter, Frigon informed Sandefur that he would send a copy of B&W's implementing document to BAT in order to demonstrate compliance with the BAT directive. Id.

Finally, the evidence reveals that BAT and/or its affiliates arranged for the removal of this "disadvantageous" information from B&W's files. A January 1985 memorandum from J. Kendrick Wells describes a process for removing such files and shipping them from Louisville, Kentucky to "BAT" in England. Proposing that certain research files be declared "deadwood," the B&W corporate counsel

suggested that Earl [Kornhurst] have the documents indicated on my list pulled,

<sup>&</sup>lt;sup>5</sup> BATUS was another United States affiliate of BAT in the corporate chain between BAT and B&W.

put into boxes and stored in the large basement storage area. I said that we would consider shipping the documents to BAT when we had completed segregating them. I suggested that Earl tell his people that this was part of an effort to remove deadwood from the files and that neither he nor anyone else in the department should make any notes, memos or lists.

#### Ex. 116 at 1-2.

The available evidence thus demonstrates BAT's extensive efforts to shield itself and its subsidiaries from civil discovery and legal liability, and to do so through a course of fraud, suppression of research, and directing its extensive network of affiliates, subsidiaries, and competitors that they do the same. Lest information be discovered where research "could serve as road maps for a plaintiff's lawyer," Ex. 125 at 1, BAT and its affiliates instituted a system whereby research was suppressed and hidden from the possibility of disclosure in litigation or to the public at large.

# 2. <u>BAT's Influence And Control Of Its Subsidiaries In Imposing A Uniform Position On Smoking And Health</u>

The public evidence, as described above, demonstrates BAT's extensive promotion of, and complicity in, the fraudulent and tortious conduct of the conspiracy alleged in the Complaint. Additional evidence, outlined in Part III of the United States' Proffer, explains the various institutions, structures, forums, and individuals utilized by BAT to carry out its tortious and unlawful conduct.

At the outset of its creation in 1976, BAT asserted its reservation of "ultimate authority for the matters of the greatest importance" to its corporate interests. Ex. 135; Proffer at 38-39. In a document entitled "Delegated Authority," which (aside from its title line) is an exact replica of an October 1974 BATCo. issuance when it was the parent of the entire BAT Group, the BAT board kept for itself complete responsibility for objectives and strategies, as well as significant research and development expenditures. See Ex. 135 at 20; Proffer at III.B.

As head of a large tobacco conglomerate with hundreds of tobacco subsidiaries, BAT was not content to remain a mere holding company concerned only with financial statements and investment reports. Through an extensive infrastructure, BAT established and enforced a uniform policy on smoking and health issues which entailed coordination of research and development throughout the BAT Group.<sup>6</sup>

Once internal but now available publicly, an important document entitled "Statement of Business Conduct" illustrates the breadth and depth of BAT's reach. Ex. 76. That document applied to "all directors, officers, and employees of every company within the BAT Industries Group of companies," Ex. 76 at 1. It required BAT's subsidiaries to certify compliance with BAT directly. Id. at 3. Importantly, the Statement of Business Conduct incorporated a number of policies, including a March 1984 circular entitled "Legal Considerations on Smoking & Health Policy." While telling subsidiaries to be "factually and scientifically correct," BAT identified for subsidiaries the bounds of such statements: "[Smoking] may be responsible for the alleged smoking related diseases or it may not. No conclusive evidence has been advanced and the statistical association does not amount to proof of cause and effect. Thus a genuine scientific controversy exists." Ex. 61 (emphasis added).

The dissemination — and imposition — of a conglomerate-wide, substantive position was facilitated by BAT's extensive network of committees, working groups, and boards to

Indeed, courts have not been hesitant to find that BAT is no "mere holding company". See State of Oklahoma v. R.J. Reynolds Tobacco Co., No. CJ-96-1499, slip op. at 2 (Okla. Dist. Ct. Dec. 8, 1997) (holding that "there is sufficient evidence to show that B.A.T Industries P.L.C. is in the tobacco business, that it exercises significant and, perhaps, complete dominion and control over all its subsidiaries, including the tobacco companies, and certainly with regard to group wide policies, strategies, and marketing activities directed at the world-wide consuming public"); State of Alaska v. Philip Morris, Inc., No. 1JU-97-915CI, slip op. at 12 (Alaska Super. Ct. Oct. 9, 1998) (stating that "the actions of B&W, as they relate to the issues in this lawsuit, are all controlled by B.A.T Industries").

promulgate and enforce BAT policies. In some cases, BAT merely assumed control of existing committees that had been created when BATCo. commanded the entire BAT Group; other committees and boards were created anew by BAT to further maintain its influence over its subordinates. Among these groups are the following:

- The <u>Chairman's Policy Committee</u>, later renamed the <u>Chairman's Executive</u> <u>Committee</u>, served as "the key executive body of the Board," Ex. 148 at 2, and was "responsible for the day to day management of the Group." Ex. 149 at 1. Among other initiatives, the CPC/CEC created and promoted Project Battalion, which imposed a "new structure [to] provide for clear strategic direction and will incorporate very clear decision processes for those issues which cannot, or should not, be left to end markets." Ex. 186 at 2; Proffer at 42-45.
- The <u>Tobacco Division Board</u>, was formed to give initial consideration to various issues, such as smoking and health, research policy, and marketing policy, before referring them to the Main Board. Ex. 191; Proffer at 45-47.
- The <u>Tobacco Strategy Review Team</u>, later renamed the <u>Tobacco Strategy Group</u>, was established to address strategic issues that affected multiple groups "as a focus for co-ordination and for monitoring the implementation of specific strategies." Ex. 202 at 8. In addition to large "strategic" issues, the TSRT/TSG was involved in a number of specific "tactical" matters, such as cigarette design issues, including the development of a new Barclay filter; specific marketing and advertising strategies; and the development of Y-1 tobacco, a genetically-engineered tobacco plant bred to be higher in nicotine content. Proffer at 47-51.
- The Chairman's Advisory Conferences were a series of meetings coordinated by BAT. The Chairman of BAT set the agenda for the meetings which covered a host of issues including smoking and health, marketing, and research and development. One set of meeting minutes, recently made available as a result of litigation, indicates that the CAC agreed on a number of "positive steps" to refute growing attacks by anti-smoking advocates. Among other things, the CAC recommended "[c]ontinuing the industry stance that Smoking and Health is still a debatable issue"; establishing "an effective intelligence and surveillance system" to detect ostensibly "blatantly incorrect statements," and to refute them, "wherever possible by independent people or bodies such as doctors and scientists." Ex. 239 at 4; Proffer at 52.

In addition to organizational control via boards and oversight committees, BAT populated its subsidiaries with BAT Board members. Through a series of interlocking and successive directorates, BAT ensured that each major subsidiary was staffed with one of its own.

For at least two years, the BAT and BATCo. boards were identical. Ex. 2 at 3. Subsequently, other board members, including many of those at BATCo and B&W, simultaneously or successively served as Directors of BAT. Ex. 148 at 2; Proffer at 53-54.

### 3. BAT's Direct Involvement In The Manufacture Of Cigarettes

Finally, there is evidence that BAT was directly involved in the manufacture of cigarettes in the United States and maintaining the viability of cigarette brands routinely sold in the District of Columbia. During its acquisition of American Tobacco in the mid-1990's, BAT undertook judicially enforceable obligations to manage the assets of a pre-existing cigarette manufacturing facility of American Tobacco in Reidsville, North Carolina, and maintain the viability of certain popular American cigarette brands, pursuant to an agreement with the United States Federal Trade Commission. Ex. 252. See generally Proffer at 55-58. These cigarettes included Tareyton, Silva Thins, Tall, MontClair, Riviera, Malibu, Bull Durham, Crowns, and Special Tens. Id. Although BAT subsequently merged American Tobacco into B&W, BAT is obligated to submit compliance reports to the FTC pursuant to the FTC consent decree. And, as part of the acquisition, BAT agreed to assume existing product liability claims against American Tobacco. Id.

## C. Overt Acts In Furtherance Of The Conspiracy Committed In The District Of Columbia

Additionally, the Complaint clearly alleges that BAT's co-conspirators committed several overt acts in furtherance of the conspiracy that occurred in the District of Columbia. First, the Tobacco Institute, one of BAT's alleged co-conspirators (and a co-defendant in this case), was a resident of the District of Columbia. See Compl. ¶ 22. The Tobacco Institute played a critical role in the defendants' conspiracy, principally by ensuring that the defendants' false and misleading positions on issues related to the connection between smoking and disease

were kept constantly before the public, doctors, the press, and the government. Compl. ¶ 42. In furtherance of the conspiracy, the Tobacco Institute issued a number of press releases and other public statements in the District of Columbia.<sup>7</sup>

Other co-conspirator defendants committed other overt acts in the District of Columbia as well. See, e.g., Compl. App. ¶ 105 (Philip Morris statements on Face the Nation). Moreover, similar overt acts by co-conspirators most likely occurred within the District of Columbia, as they appeared in national publications, although they may not have originated there. See, e.g., Compl App. ¶ 61 (Reynolds advertisement in U.S. News and World Report entitled "We don't advertise to children"); Compl. App. ¶ 97 (Reynolds advertisement in Sports Illustrated

<sup>&</sup>lt;sup>7</sup> See, e.g., Compl. App. ¶ 3 (attacking Surgeon General Burney article); Compl. App. ¶ 5 (press release entitled "Allen Gives Tobacco Institute Position on 'Health Scares'"); Compl. App. ¶ 6 (press release regarding marketing to youth); Compl. App. ¶ 7 (press release stating that defendants were on a "crusade" to find answers to smoking and health); Compl. App. ¶ 8 (announcing creation of Council for Tobacco Research); Compl. App. ¶ 10 (press release regarding "open question" of smoking and disease); Compl. App. ¶ 12 (press release stating that defendants knew of "no valid scientific evidence" demonstrating that tar or nicotine cause illness); Compl. App. ¶ 18 (reprint of Stanley Frank article); Compl. App. ¶ 21 (press release falsely stating that American Cancer Society had refused to release experimental data); Compl. App. ¶ 23 (advertisement in The Washington Post entitled "The question of smoking and health is still a question"); Compl. App. ¶ 24 (press release indicating that "many eminent scientists" believe that "the question of smoking and health is still very much a question"); Compl. App. ¶ 27 (press release suggesting that smoking is not harmful to pregnant women or their babies); Compl. App. ¶ 29 (press release stating that the industry is committed to discovering the answers to the smoking and health "question"); Compl. App. ¶ 33 (press release attacking 1964 Surgeon General's Report and dismissing research linking smoking to lung cancer and emphysema, and low birth weight babies to smoking mothers); Compl. App. ¶ 34 (press release stating that domestic tobacco companies are committed to "support[ing] researchers who are seeking the truth"); Compl. App. ¶ 35 (press release denying that the industry targeted youth smokers); Compl. App. ¶ 42 (press release suggesting that the contribution of smoking to disease was still an "open question"); Compl. App. ¶ 43 (press release stating that defendants were committed to research, and that "the case against cigarettes is not satisfactorily demonstrated"); Compl. App. ¶ 46 (document entitled "Fact or Fancy?"); Compl. App. ¶ 49 (press release touting "long standing policy" of discouraging smoking by children); Compl. App. ¶ 56 (press release disputing addictiveness of cigarette smoking); Compl. App. ¶ 79 (same); Compl. App. ¶ 81 (same); Compl. App. ¶ 87 (press release suggesting that cigarette companies actively discourage youth smoking); Compl. App. ¶ 91 (press release entitled "Major New Initiatives to Discourage Youth Smoking Announced"); Compl. App. ¶ 93 (press release regarding youth smoking).

magazine).8

#### III. ARGUMENT

BAT's motion to dismiss for lack of personal jurisdiction should be denied. First, the Complaint, this memorandum, and the public record are replete with concrete allegations indicating that there was a conspiracy, that BAT participated in that conspiracy, and that at least one overt act in furtherance of that conspiracy was performed in the District of Columbia by one of BAT's co-conspirators who is subject to this Court's jurisdiction. Additionally, irrespective of the conspiracy, BAT committed acts outside the District which caused tortious injury within the District, and derived substantial revenue from the sale and consumption of cigarettes in the District. These allegations constitute the <u>prima facie</u> showing necessary to carry the United States' burden of establishing specific personal jurisdiction under the D.C. long-arm statute.

Moreover, the nature and extent of BAT's involvement in the conspiracy alleged in the Complaint removes any doubt that the twin requirements of due process -- minimum contacts and reasonableness -- are well-satisfied. This Court can and must exercise personal jurisdiction over BAT.

# A. The United States Is Obligated Only to Come Forward With <a href="Prima Facie">Prima Facie</a> Proof Of Jurisdiction At This Stage.

The plaintiff has the burden of establishing the factual bases for the exercise of personal jurisdiction over the defendant when challenged. <u>Crane v. New York Zoological Soc.</u>, 894 F.2d 454, 456 (D.C. Cir. 1990); <u>Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO v. Pena</u>, 18 F. Supp.2d 6, 16-17 (D.D.C. 1998).

Indeed, the first important act of the conspiracy, the publication of the Frank Statement in January 1954, appeared in the Washington Post and other papers sold in the District of Columbia, and furthered the conspiracy's goals by fraudulently promising to support and publicize independent research into the health effects of smoking. Compl. ¶ 37; Compl. App. ¶ 1.

The law imposes no obligation upon plaintiffs to make specific allegations in a complaint that are relevant to personal jurisdiction. See Caribbean Broad. Sys., Ltd., 148 F.3d at 1090 (not plaintiff's obligation because lack of personal jurisdiction is affirmative defense and so must be raised by defendant) (citations omitted). Nevertheless, the United States has alleged in detail the nature of BAT's involvement in a conspiracy. See, e.g., Compl. ¶¶ 200-203, 173-199; Compl. App. ¶¶ 59, 108.

Where, as here, the defendant has filed a motion to dismiss with a supporting affidavit, the plaintiff may file an affidavit in support of jurisdiction that presents evidence relating to personal jurisdiction. See Caribbean Broad. Sys., Ltd., 148 F.3d at 1090. All factual disputes raised by the affidavits are construed in the plaintiff's favor. Edmond, 949 F.2d at 424; Crane v. New York Zoological Soc., 894 F.2d 454, 456 (D.C. Cir. 1990); Reuber v. United States, 750 F.2d 1039, 1052 (D.C. Cir. 1984).

Where, as here, the parties are limited to written submissions, a plaintiff need only make a <u>prima facie</u> showing of the pertinent jurisdictional facts to satisfy its burden and prevail on a motion to dismiss for lack of personal jurisdiction. <u>Edmond</u>, 949 F.2d at 424 (burden of establishing personal jurisdiction satisfied with <u>prima facie</u> showing unless trial court holds an evidentiary hearing); <u>Dooley v. United Technologies Corp.</u>, 786 F. Supp. 65, 70 (D.D.C. 1992) (citing <u>Chase v. Pan-Pacific Broadcasting, Inc.</u>, 617 F. Supp. 1414 (D.D.C. 1985)); <u>First Chicago Int'l v. United Exch. Co.</u>, 836 F.2d 1375, 1378 (D.C. Cir. 1988).

As detailed herein, the United States has far exceeded that threshold requirement.

# B. Jurisdiction Over Nonresident Co-conspirators Is Authorized Under The District Of Columbia Long-arm Statute.

The District of Columbia's long-arm statute permits this Court to exercise jurisdiction over a nonresident, co-conspirator defendant like BAT. Courts in this Circuit have routinely

interpreted the District of Columbia's long-arm statute<sup>9</sup> to authorize personal jurisdiction over nonresident defendants with few or no direct contacts to the forum, where they have participated in conspiracies and the conduct of their co-conspirators in furtherance of the conspiracy has occurred or had effects in the District of Columbia. See, e.g., Edmond, 949 F.2d at 424-26; First Chicago Int'l, 836 F.2d at 1378-79; Mandelkorn v. Patrick, 359 F. Supp. 692, 696 (D.D.C. 1973); Dorman v. Thornburgh, 740 F. Supp. 875 (D.D.C. 1990), aff'd, 955 F.2d 57 (D.C. Cir. 1992). 10

- (1) transacting any business in the District of Columbia;
- (2) contracting to supply services in the District of Columbia;
- (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
- (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia . . . ;

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

The United States focuses this memorandum on the requirements set out in section 13-423(a), as there can be no serious dispute that the United States' claims for relief alleged in the Complaint arise from the defendants' tortious and conspiratorial conduct. <u>See D.C. Code § 13-423(b)</u>.

The District of Columbia long-arm statute, D.C. Code § 13-423, reads in relevant part:

<sup>§ 13-423.</sup> Personal jurisdiction based upon conduct.

<sup>(</sup>a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's -

Courts outside the District of Columbia have exercised conspiracy-based jurisdiction over nonresident U.S. defendants. See, e.g., Textor v. Board of Regents of Northern Illinois University, 711 F.2d 1387, 1393 (7th Cir. 1983); Hoffman v. Halden, 268 F.2d 280, 295-96 (9th Cir. 1959), rev'd on other grounds sub nom., Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); Vermont Castings, Inc. v. Evans Products Co., 510 F. Supp. 940, 944 (D. Vt. 1981); National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305 (N.D. Ga. 1980); Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F. Supp. 559, 564 (M.D.N.C. 1979); Finance Co. of America v. Bank America Corp. 493 F. Supp. 895, 907 (D. Md. 1980).

The District of Columbia's long-arm statute confers jurisdiction over anyone "who acts directly or by an agent" in performing acts enumerated in the statute. D.C. Code § 13-423(a). The term "agent" in this statute includes co-conspirators. Mandelkorn, 359 F. Supp. at 695. Personal jurisdiction under the conspiracy theory is based on the agency relationship between co-conspirators, so that an action within the forum by a co-conspirator, acting as an agent, is attributed to a co-conspirator outside the forum. Dooley, 786 F. Supp. at 79. Accordingly, this Court can exercise personal jurisdiction over a nonresident co-conspirator who has had no direct contacts of its own with the District of Columbia, provided that its co-conspirator is subject to the D.C. court's jurisdiction. Id.; accord Dorman, 740 F. Supp. at 877-78; Mandelkorn, 359 F. Supp. at 695 ("Co-conspirators have long been held to an agency relationship when overt acts are done in furtherance of a conspiracy."). As the Ninth Circuit has stated:

If sufficient allegations appear of the acts of one defendant among the conspirators, causing damage to plaintiff, and the act of the particular defendant was done pursuant to the conspiracy, during its course, in furtherance of the objects of the conspiracy, with the requisite purpose and intent . . . then all defendants are liable for the acts of the particular defendant under the general principle of agency on which conspiracy is based.

Hoffman v. Halden, 268 F.2d 280, 295-96 (9th Cir. 1959) (quoted in both Dorman, 740 F. Supp.

Other courts have exercised conspiracy-based jurisdiction over nonresident foreign defendants, including BAT. <u>Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.</u>, 26 F. Supp.2d 593, 601 (S.D.N.Y. 1998); <u>State of Washington v. American Tobacco Co.</u>, No. 96-2-15056-8-SEA, slip op. at 10-12 (Wash. Super. Ct. June 9, 1998); <u>State of Montana v. Philip Morris, Inc.</u>, No. CDV-97-306 (Mont. Dist. Ct. Sept. 22, 1998); <u>Small v. Lorillard Tobacco Co.</u>, 672 N.Y.S.2d 601, 607 (Sup. Ct. 1997) (court recognized conspiracy theory, found enough facts to support a <u>prima facie</u> showing, exercised preliminary personal jurisdiction, but dismissed BAT's motion without prejudice "at this early stage of the proceeding"); <u>General Motors Corp. v. Ignacio Lopez de Arriortua</u>, 948 F. Supp. 656 (E.D. Mich. 1996) (executives of a German automobile maker); <u>Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.</u>, 863 F. Supp. 186 (D. Del. 1993) (English corporation with headquarters in Southampton, England that manufactures lenses at its Southampton facility); <u>Cameron v. Owens-Corning Fiberglass Corp.</u>, 695 N.E.2d 572 (Ill. App. Ct. 1998), <u>cert. denied</u>, 119 S. Ct. 872 (1999)

at 878 and Mandelkorn, 359 F. Supp. at 695)11

To establish personal jurisdiction under D.C.'s long-arm statute over a nonresident defendant on the basis of the acts of its co-conspirator, the plaintiff must allege specifically (1) the existence of a conspiracy; (2) the nonresident defendant's participation in the conspiracy; and (3) overt act(s) by a co-conspirator who is subject to personal jurisdiction in the forum.

Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997);

Edmond, 949 F.2d at 425.

Because the conspiracy theory is not an independent basis of jurisdiction, but rather is one means of meeting the elements of the long-arm statute, <u>Dooley</u>, 786 F. Supp. at 79-80, different subsections of section 13-423(a) vary in their treatment of the third element of the test for authorizing jurisdiction over a nonresident co-conspirator such as BAT. Under section 13-423(a)(1), the Court may obtain personal jurisdiction over a nonresident co-conspirator, even one with no direct contacts to the District of Columbia, when the plaintiff alleges the commission of an overt act in the District, in furtherance of the conspiracy, by a co-conspirator who transacts business in the District. <u>Mandelkorn</u>, 359 F. Supp. at 696-697. Under this subsection, the

The legislative history of the District of Columbia long-arm statute makes clear that "Congress' overall intent was to provide the [District of Columbia's] courts, to the greatest extent possible, with essentially identical long-arm jurisdiction as were then available in Maryland and Virginia," to account for the geographic proximity of the three jurisdictions and the constant flux of residents between them. Margoles v. Johns, 483 F.2d 1212, 1215-16 (D.C. Cir. 1973). Thus, it is important that federal courts in Maryland also interpret the Maryland long-arm statute to allow the exercise of jurisdiction over nonresident defendants who have participated in a conspiracy that was furthered by an overt act by co-conspirators in Maryland. McLaughlin v. Copeland, 435 F. Supp. 513 (D. Md. 1977); Finance Company of America v. BankAmerica Corp., 493 F. Supp. 895 (D. Md. 1980); Cawley v. Bloch, 544 F. Supp. 133 (D. Md. 1982). Counsel for the United States is aware of only one case in Virginia that addresses personal jurisdiction under a conspiracy theory. See Willis v. Semmes, Bowen & Semmes, 441 F. Supp. 1235 (E.D. Va. 1977). After performing the same jurisdictional analysis described above, the district court then dismissed the plaintiff's claim because he failed to demonstrate that "the alleged conspiracy or any overt act in furtherance of it occurred in Virginia." Id. at 1242.

plaintiff need not even allege that any injury occurred in the District. <u>Dooley</u>, 786 F. Supp. at 79-80.

Under section 13-423(a)(3), a Court may exercise jurisdiction over a nonresident defendant based on specific factual allegations that its co-conspirator committed an overt act in the District, in furtherance of the aims of the conspiracy, and that act caused injury in the District. Mandelkorn, 359 F. Supp. at 695; Dorman, 740 F. Supp. at 878 (evidence of an overt act done in the District in furtherance of a conspiracy, an agreement in which nonresident defendant had joined, and injury in the District is necessary to exercise jurisdiction over nonresident defendant); Hasenfus v. Corporate Air Servs., 700 F. Supp. 58, 62 (D.D.C. 1988) (plaintiff required to allege that an overt, tortious act occurred in D.C.); Reuber, 750 F.2d at 1050 (need to allege specific tortious acts in D.C. by at least one of the alleged co-conspirators); accord Dooley, 786 F. Supp. at 79-80 (section 13-423(a)(3) imposes, by its own terms, the requirement of injury within the forum while section 13-423(a)(1) poses no such requirement).<sup>12</sup>

As discussed below, the United States has gone well beyond a mere <u>prima facie</u> showing that a conspiracy existed; that BAT participated in the conspiracy; that BAT's co-conspirators who are themselves subject to personal jurisdiction in this Court committed multiple overt acts, both inside and outside the District, in furtherance of the conspiracy; and that such acts caused massive injury in the District.

# C. BAT Is Subject To The Personal Jurisdiction Of This Court Under Section 13-423(a)(1) (Transacting Business).

Counsel for the United States is not aware of any case in this Circuit which has ruled on whether a nonresident co-conspirator such as BAT might also be subject to conspiracy-based jurisdiction under section 13-423(a)(4) of the D.C. long-arm statute. However, in American Ass'n of Cruise Passengers v. Cunard Line, Ltd., 691 F. Supp. 379 (D.D.C. 1987), the court discussed the conspiracy theory under section 13-423(a)(4) but dismissed plaintiff's claim for failure to allege overt acts by co-conspirators in the forum.

In this Circuit, nonresident defendants who are co-conspirators may be subject to personal jurisdiction under section 13-423(a)(1) of the long-arm statute. <u>Dooley v. United Technologies Corp.</u>, 786 F. Supp. 65 (D.D.C. 1992); <u>Dorman v. Thornburgh</u>, 740 F. Supp. 875 (D.D.C. 1990); <u>Mandelkorn v. Patrick</u>, 359 F. Supp. 692 (D.D.C. 1973). The United States' presentation of substantial, publicly available evidence satisfies the three requirements to make out a <u>prima facie</u> showing of personal jurisdiction under section 13-423(a)(1) under a conspiracy theory:

- (1) The United States has alleged pertinent jurisdictional facts to show the existence of a conspiracy among the named defendants. See First Chicago Int'l v. United Exch. Co., Ltd., 836 F.2d 1375, 1378 (D.C. Cir. 1988); Cawley v. Bloch, 544 F. Supp. at 133.
- (2) The United States has presented facts, not mere speculation, showing that BAT was a co-conspirator and specifying the nature of BAT's role in the conspiracy. See First Chicago Int'l, 836 F.2d at 1378-79; Dooley, 786 F. Supp. at 78 (citing Hasenfus v. Corporate Air Services, 700 F. Supp. 58, 62 (D.D.C. 1988)).
- (3) The United States has alleged specific facts showing that at least one of BAT's co-conspirators is directly subject to personal jurisdiction in the District (indeed, none of BAT's co-conspirators contests personal jurisdiction in this action) and that this co-conspirator has committed at least one overt act in the District in furtherance of the conspiracy. See, e.g., Mandelkorn, 359 F. Supp. at 696; Dooley, 786 F. Supp. at 78-79.

Since the United States has supported its allegations of overt acts committed in the forum by co-conspirators with sufficient facts, it need not show that BAT, outside of its participation in the conspiracy, has any other contacts with the District. Dorman, 740 F. Supp. at 877-878 (emphasis added) ("[b]ased on the principles of agency law, under the long-arm statute this Court can exercise personal jurisdiction over out-of-state defendants who have no direct contacts with the District of Columbia if the plaintiff alleges that an overt act in furtherance of conspiracy was committed in the District of Columbia by any member of the conspiracy"). Here, there are numerous acts committed in the District of Columbia by BAT's co-conspirators who are subject

to personal jurisdiction in this forum. We consider the three requirements in turn.

1. The United States Has Sufficiently Alleged A RICO Conspiracy Under 18 U.S.C. § 1962(d) And A Civil Conspiracy Under Principles Of Tort Law.

The first requirement pertinent to the jurisdictional analysis are the allegations of the Complaint concerning a conspiracy. The United States' eighty-seven page Complaint in this case, along with its forty-three page Appendix of Racketeering Acts, lays out in substantial detail the existence, nature, and extent of the defendants' RICO and civil conspiracy.<sup>13</sup>

First, the United States has alleged with particularity that the defendants, including BAT, comprised an association-in-fact enterprise. As alleged, the enterprise was formed not later than December 1953 at a meeting of the chief executives of the five leading American cigarette companies. Compl. ¶¶ 4, 30-34, 173-199. For over 45 years, the ongoing enterprise has created and controlled multiple organizing formal and informal structures, including defendants Council of Tobacco Research and the Tobacco Institute, to further the ultimate purposes of the enterprise -- to protect and enhance the market for cigarettes and to maximize profits. Compl. ¶¶ 4, 173-199. Second, the Complaint provides ample evidence of the enterprise's indisputable engagement in and effect on interstate commerce. Compl. ¶ 173; see generally Compl App. (detailing defendants' numerous publication of statements and advertising in nationwide newspapers and other publications, press releases, etc.). Third, the Complaint contains numerous allegations concerning communications among members of the enterprise, made

The elements of a conspiracy to violate 18 U.S.C. § 1962(c) are (1) the existence of an enterprise; (2) that the enterprise was engaged in, or its activities affected, interstate or foreign commerce; and (3) that the defendant knowingly agreed to the commission of a violation of 18 U.S.C. § 1962(c). See, e.g., Salinas v. United States, 522 U.S. 52 (1997); United States v. Muskovsky, 863 F.2d 1319, 1324 (7th Cir. 1988).

Of the eleven defendants, only Liggett argues — without merit — that the United States has not adequately pleaded the existence of an enterprise. See Liggett Group Inc.'s Motion to Dismiss, filed December 27, 1999, at 24.

independently and through organizations controlled by defendants, that evince agreement to carry out a scheme to defraud the American public, and to advance that scheme through use of the mails and wires. See, e.g., Compl. ¶¶ 56-69 (describing joint industry action through CTR); Compl. App. ¶¶ 38, 44, 66, 67, 70, 73, 77, 88, 98 (letters to counsel for cigarette companies urging joint funding for CTR lawyer-controlled "Special Projects"); Compl. App. ¶¶ 59, 108 (communications between BAT and Philip Morris regarding industry cooperation on smoking and health issues).

Similarly, the Complaint and Appendix to the Complaint ("Compl. App.") allege and provide substantial <u>prima facie</u> evidence of a civil conspiracy. Compl. ¶¶ 161-165, The factual allegations cited above which demonstrate the existence of a RICO conspiracy also show that the defendants agreed to commit, and did commit, numerous concerted fraudulent, tortious, and illegal acts in furtherance of their common purposes. <u>See, e.g.</u>, Compl. ¶¶ 24-125; Compl. App. ¶¶ 1-116.

Moreover, the United States has described in detail in the Complaint the aims of this conspiracy among the defendants, for example, to deceive the American public about the health effects of smoking through perpetuation of a false "controversy" about the health effects of smoking, Compl. ¶¶ 135, 156; to manipulate, conceal, and misrepresent scientific evidence linking smoking to disease at the same time defendants avowed publicly that they were engaged in disinterested research, Compl. ¶¶ 56-60; to deny that smoking is addictive, Compl. ¶¶ 70-82; to not undertake biological research in-house and to share among all cigarette manufacturing defendants development of a less hazardous cigarette (thereby ensuring that no defendant would ever seriously attempt to develop and market a less hazardous product), e.g., Compl. ¶¶ 44-48; to deceive the public about the marketing of cigarettes to children, Compl. ¶¶ 98-100; and generally to maximize their profits irrespective of the health consequences to the public, Compl. ¶¶ 34,

174.

### 2. <u>BAT Participated In The Conspiracy Alleged In The Complaint.</u>

The second prong of the jurisdictional inquiry concerns the <u>prima facie</u> evidence underlying BAT's participation in the alleged conspiracy. The Statement of Facts in this memorandum and the attached Proffer set forth in detail the nature and extent of the involvement by BAT in the RICO conspiracy and civil conspiracy alleged in the Complaint. Although all of that publicly available evidence is not repeated below, we do emphasize those aspects of BAT's participation which were most critical to BAT, its corporate affiliates, and the conspiracy as a whole.

### a. BAT Perpetuated Defendants' "Open Controversy."

As a tobacco conglomerate with hundreds of subsidiaries worldwide, it bears repeating that BAT was instrumental in policing and advancing the defendants' perpetuation of the false "controversy" concerning the health effects of smoking, in the United States and abroad. For example, in 1983 Sir Patrick Sheehy, BAT's Chairman, sent a letter to George Weissman at Philip Morris in which he reproved Philip Morris for launching an advertising campaign in Holland that appeared to imply that the smoking of BARCLAY cigarettes (manufactured by BAT Group companies) could be harmful to health. Compl. App. ¶ 59; Statement of Facts, supra; Proffer at 16-17. Sheehy noted in his letter that Philip Morris ignored the potential "long-term adverse impact" of its action on the industry and that Philip Morris conduct "makes a mockery of Industry co-operation on smoking and health issues," an obvious euphemism for the defendants' agreement to perpetuate the open controversy. Id.

Another significant example of BAT's perpetuation of the open controversy is its development of the <u>Compendium of Epidemiological Studies</u>, a "Special Projects" type research initiative designed to discredit scientific evidence linking smoking to disease, and intended to be used to deceive the public about the health effects of smoking. Statement of Facts, <u>supra</u>; Proffer at 22-25. BAT intended to distribute the <u>Compendium</u> to "lawyers and scientists" in the United States as well as other cigarette manufacturers in this country. Ex. 80 at 1.

BAT also conspired with its affiliated companies to perpetuate the open controversy. 15

The RICO statute allows prosecution of civil conspiracies between parent companies and their subsidiaries. Unlike the Sherman Act, which is designed to prevent separate economic actors with different economic interests from colluding to aggregate economic power, one of the purposes of the civil RICO statute is to prevent infiltration of legitimate businesses by racketeers and prevent those racketeers from profiting from their conduct. Compare Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (Sherman Act not designed to address conspiracies between parents and subsidiaries) with Haroco, Inc. v. American Nat. Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984) (RICO statute reaches intracorporate conspiracies).

An important example is BAT's creation and dissemination of the "Legal Considerations on Smoking and Health Policy," first circulated to BAT Group companies in 1984, and subsequently made part of the 1993 "Statement of Business Conduct" to which all BAT Group employees were to adhere. Statement of Facts; Proffer 20-22. BAT's directive to its affiliated companies and employees around the world could not have been more clear: "...a genuine scientific controversy exists. The Group's position is that causation has not been proved and that

Moreover, BAT may not seek shelter in the Eighth Circuit's reasoning in <u>Fogie</u>, where the court found that an intracorporate RICO conspiracy could not exist because there was no "distinctiveness or independence" between the parent corporation and the wholly-owned subsidiary, <u>id.</u> at 898, and because "their actions are driven by a single consciousness." <u>Id.</u> (citing <u>Copperweld</u>, 467 U.S. at 771). Indeed, the <u>Fogie</u> court's reasoning is unavailing for several reasons: first, in BAT's own affidavit, it disavows this premise of sharing a "single consciousness" with its subsidiaries. <u>See</u> Cook Aff. at ¶¶ 11, 12. Second, should BAT now contend otherwise and admit that it and its subsidiaries lack "distinctiveness or independence", it must submit to jurisdiction under an "alter-ego" theory. <u>See I.A.M. Nat'l Pension Fund v. Wakefield Indus.</u>, <u>Inc.</u>, 699 F.2d 1254, 1259 (D.C. Cir. 1983).

Finally, even if <u>Fogie</u> were the law of this circuit, the <u>Fogie</u> court's reasoning applied only because the plaintiff had alleged a "wholly intracorporate conspiracy." 190 F.3d at 899. Because the Complaint alleges, and the evidence demonstrates, that BAT also conspired with defendants who had no corporate affiliation with it, (<u>see generally</u> Statement of Facts, Proffer) BAT may not rely on an argument that it cannot be subject to personal jurisdiction based solely on an affiliated co-conspirators' ties (<u>i.e.</u>, B&W or BATCo.) to this forum.

In addition to the Seventh Circuit, the Third and Ninth Circuits, as well as a number of District Courts, have found that provisions of the RICO statute contemplate reaching intracorporate conspiracies. Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165, 1167 (3d Cir. 1989) (stating that "the [RICO] enterprise and the individual defendant need not be distinct for the purposes of section 1962(a)," and finding that "group" of three integrated companies conspired); Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 787 (9th Cir. 1996) (corporation can engage in RICO conspiracy with its own officers and representatives) (citing United States v. Benny, 786 F.2d 1410, 1416 (9th Cir.) (stating that the corporate form is the "sort of legal shield for illegal activity that Congress intended RICO to pierce"), cert. denied, 479 U.S. 1017 (1986)); Rouse v. Rouse, No. 89 CV 597, 1990 WL 160194, at \*14 (N.D.N.Y. Oct. 17, 1990); Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1135 (D.N.J. 1989) (recognizing "intracorporate conspiracies is more faithful to the broad purpose of RICO than a narrow reading which is modeled on antitrust law"); Pandick Inc. v. Rooney, 632 F. Supp. 1430, 1435 (N.D. Ill. 1986); Callan v. State Chemical Mfg. Co., 584 F. Supp. 619, 623 (C.D. Ill. 1984); Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1307 n.9 (D. Colo. 1984); Mauriber v. Shearson/American Exp., Inc., 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983). But see Fogie v. Thorn Americas, Inc., 190 F.3d 889 (8th Cir. 1999).

we do not ourselves make health claims for tobacco products." Ex. 60 at 2. Employees were subject to termination of employment if they did not abide this directive. <u>Id.</u> Of course, this is only one of a number of examples of BAT's promulgation of smoking and health "guidelines" in order to make sure all of its worldwide subsidiaries did nothing to undermine the defendants' conspiracy. Statement of Facts, <u>supra</u>; Proffer at 13-22.

b. BAT Suppressed Research And Conspired To Prevent Existing Adverse Scientific Evidence From Reaching The United States.

The Statement of Facts and Proffer detail BAT's preoccupation with civil discovery and liability considerations in the United States and its efforts to prevent adverse scientific evidence from being generated in the first instance, while making sure that existing adverse scientific evidence in BAT Group company files never could be discovered in the United States. A prominent example of this took place in 1986 with BAT's Canadian affiliate, IMASCO. In that instance, BAT Chairman Sheehy himself intervened to deny IMASCO's request for support of research into a less hazardous cigarette. In killing the research, Sheehy explained in a letter to IMASCO that BAT did not want its affiliates to be manufacturing less hazardous products. Rather,

[t]he BAT objective is and should be to make the whole subject of smoking <u>acceptable</u> to the authorities and to the public at large since this is the real challenge facing the Industry. . . .

A second practical objection is that in attempting to develop a 'safe' cigarette you are, by implication in danger of being interpreted as accepting that the current product is 'unsafe' and this is not a position that I think we should take."

Ex. 255 (emphasis in original); Statement of Facts, supra; Proffer at 28-29.

In addition to suppressing research that could be harmful to the "position" BAT was taking publicly, BAT also conspired to control the flow of information into the United States in order to prevent adverse evidence from reaching United States' shores where it would expose the

lie of defendants' public fraud and could constitute devastating admissions in products liability litigation. BAT issued "distribution" policies designed to prevent B&W from receiving the statements and research in other BAT Group company files (where presumably it could be discovered in US products liability litigation) which clearly acknowledged smoking caused disease. Statement of Facts, supra; Proffer at 34-35.<sup>16</sup>

3. The United States Has Properly Alleged That Co-Conspirators Of BAT Who Are Subject To This Court's Jurisdiction Have Committed Numerous Overt Acts In The District Of Columbia In Furtherance Of The Aims Of The Conspiracy.

The third and final requirement of the section 13-423(a)(1) analysis under the conspiracy theory of jurisdiction requires that the United States allege at least one overt act committed in furtherance of the conspiracy in the District of Columbia by one of BAT's co-conspirators, who is subject to the Court's jurisdiction. Since every one of BAT's alleged co-conspirators has conceded it is subject to the personal jurisdiction of this Court by failing to raise the issue in its first responsive pleading (see Fed. R. Civ. P. 12(b)), the only remaining issue is whether it has properly been alleged in the Complaint that at least one of these co-conspirators committed an overt act in the District in furtherance of the conspiracy. A brief look at the Complaint removes any doubt of the nature and extent of the numerous allegations in this case concerning overt acts committed by BAT's co-conspirators in the District.

Foremost among these are the acts committed by defendant the Tobacco Institute ("TI"), headquartered in Washington, D.C., and a key public relations arm of the defendants' conspiracy. TI publicly promoted defendants' false and misleading positions on the connection between smoking and disease. See Compl. ¶ 22, 42. TI disseminated numerous fraudulent and

BAT's long-standing and clear knowledge of the health effects of smoking and the addictiveness of nicotine are outlined in the Statement of Facts, <u>supra</u>, and the Proffer at II.A.-B.

misleading press releases and other publications in Washington, D.C., and published numerous statements in the Washington Post and other periodicals. See, e.g., Compl. App. ¶¶ 5, 7, 10, 23, 27, 43, 79, 87, 93; see also Statement of Facts, supra. Furthermore, other defendants committed additional overt acts in furtherance of the conspiracy within the District of Columbia. See, e.g., Compl. App. ¶ 105. Still more overt acts occurred within the District of Columbia as misleading statements appeared in national publications, though originating elsewhere. See, e.g., Compl. App. ¶¶ 61, 97. Finally, it is clear that all of the cigarette manufacturing defendants have marketed, advertised, and sold cigarettes in the District of Columbia, cigarettes that the United States alleges they knew are unreasonably dangerous when used as intended. Compl. ¶\_\_.

4. BAT Is Also Subject To The Personal Jurisdiction Of This Court Under Section 13-423(a)(1) Because Of Its Direct Transaction Of Business In The District Of Columbia.

The preceding discussion has demonstrated that BAT is subject to the jurisdiction of this Court based upon its participation in the conspiracy alleged in the Complaint. In addition to this basis for jurisdiction under section 13-423(a)(1), the Court may exercise jurisdiction directly over BAT under the same provision of the long-arm statute, because BAT has "transact[ed] . . . business in the District of Columbia." See D.C. Code § 13-423(a)(1). BAT transacted business in the District of Columbia by virtue of its acquisition and operation of the American Tobacco Company. As outlined in the Statement of Facts, supra, and supported by the evidence attached to the Proffer, see Proffer at IV., pursuant to a judicially-enforceable agreement with the United States Federal Trade Commission ("FTC"), BAT and its subsidiary, B&W, undertook various enforceable obligations to manage the assets of American Tobacco's cigarette manufacturing facility in Reidsville, North Carolina, and to maintain the viability of certain American Tobacco

See also Compl. App.  $\P\P$  3, 6, 8, 12, 18, 21, 24, 29, 33, 34, 35, 42, 46, 49, 56, 81, 91.

Brands, most (if not all) of which were routinely distributed and sold in the District of Columbia and elsewhere in the United States. Specifically, BAT and B&W promised in the Preservation Agreement that it would:

- a. take such actions as are necessary to maintain the viability and marketability of the Reidsville Assets by preventing the destruction, removal, wasting, deterioration, sale, transfer, encumbrance or impairment of any of the Reidsville Assets except for ordinary wear and tear, and
- b. take such actions as are necessary to maintain the viability and marketability of the ATC Brands Assets by by preventing the destruction, sale, transfer, encumbrance or impairment of any of the ATC Brands Assets.

Ex. 252 at ¶ 4, Preservation Agreement, (FTC Bates Page 28).

This undertaking is more than sufficient to confer jurisdiction under section 13-423(a)(1). That provision "embraces those contractual activities of a nonresident defendant which cause a consequence here," Mouzavires v. Baxter, 434 A.2d 988, 992 (D.C. 1981) (en banc) (per curiam), cert. denied, 455 U.S. 1006 (1982), and is coextensive with the due process clause. Id. By maintaining the viability of the American Tobacco brands, and ensuring the management of the factory, BAT ensured that certain cigarette brands would be produce; these brands were distributed throughout the United States, including within the District of Columbia; accordingly, BAT's undertaking constitutes a "transact[ion of] any business in the District of Columbia."

Cohane v. Arpeja-California, Inc., 385 A.2d 153, 159 (D.C.) (defendant transacted business where it sold to clothing stores in District of Columbia and received payment for same), cert.

denied, 439 U.S. 980 (1978). In short, BAT agreed in the Preservation Order and Consent

Any belated suggestion by BAT that it did not itself operate the Reidsville factory or engage in extensive activities to maintain the viability of ATC brands is beside the point for jurisdictional purposes. Even had those tasks related to these obligations been carried out by B&W (a proposition that is far from clear), BAT nevertheless represented to the FTC that it was responsible for ensuring that these tasks were performed. Certainly, under the terms of the

Decree, to stand in the place of American Tobacco (including, notably, with respect to American Tobacco's existing product liability claims, see Ex. 252 ¶¶ 5-6); it should not be permitted to disclaim that responsibility in order to avoid personal jurisdiction in this case.

D. BAT Also Is Subject To Personal Jurisdiction Under Section 13-423(a)(3)
Of The Long-Arm Statute As A Result Of Its Participation In A
Conspiracy (Tortious Injury And Act In D.C.).

Section 13-423(a)(3) of the D.C. long-arm statute subjects a non-resident party to jurisdiction where that party is responsible for an act or omission in the District of Columbia that causes a tortious injury in the District of Columbia. See D.C. Code § 13-423(a)(3). Courts in this jurisdiction have recognized that participation in a conspiracy may subject a non-resident defendant to jurisdiction in the District under section 13-423(a)(3) when a plaintiff (1) properly alleges a conspiracy, (2) presents facts, not mere speculation, that set forth the defendant's participation in the conspiracy alleged, and (3) alleges that one of the defendant's co-conspirators committed an act or omission in the District of Columbia in furtherance of the conspiracy that caused tortious injury in the District. Dooley, 786 F. Supp. at 78-80; Dorman, 740 F. Supp. at 877-78; Mandelkorn, 359 F. Supp. at 695; see also Edmond, 949 F.2d at 425 (abuse of discretion to deny jurisdictional discovery when plaintiff has specifically alleged the three elements).

The United States has already demonstrated that the first two elements for jurisdiction under § 13-423(a)(3) are satisfied. In the Statement of Facts, Section III.C., and the Proffer, the United States has set forth the substantial legal and factual basis supporting (1) the Complaint's

Consent Decree, if the assets or brand names were mismanaged, BAT could not avoid enforcement by indicating that it had assigned away its obligations. In other words, while BAT might be quite able to delegate authority, it could not delegate its responsibility.

Moreover, any suggestion that BAT undertook these obligations merely for the sake of its subsidiary, B&W, is also irrelevant to this analysis. See Quetel Corp. v. Columbia Communications Int'l, Inc., 779 F. Supp. 183, 185 n.2 (D.D.C. 1991) (voluntary undertaking on behalf of third party does not negate fact that defendant "transacted business" in District of Columbia).

allegations of a conspiracy in this case, and (2) BAT's participation in that alleged conspiracy. Accordingly, it will not repeat that discussion here.

The third requirement for jurisdiction under § 13-423(a)(3) -- proper allegations of tortious injury in the District from acts and omissions in the District done in furtherance of the conspiracy -- is also met. First, in this memorandum the United States has already highlighted the numerous overt acts committed by BAT's co-conspirators in the District of Columbia set forth in the Complaint. See supra Section III.C.3., (overt acts of D.C.-based Tobacco Institute and others). These acts are alleged to have been undertaken in furtherance of a conspiracy to defraud the American public about, inter alia, the health effects of smoking and the addictiveness of nicotine. See Compl. passim. It further has been alleged that this massive fraud induced and addicted people to cigarettes and/or prevented cigarette smokers from being able to stop smoking. Compl. ¶ 137.

The Complaint alleges that defendants' fraudulent conduct caused consumers of defendants' products to suffer dangerous diseases and injuries. E.g. Compl. ¶ 6, 137. Compl. ¶ 87. For example, the Complaint alleges that defendants caused injury to consumers, including in the District of Columbia, by marketing "low tar/low nicotine" products — which defendants knew were not appreciably less harmful as smoked by human smokers — as an alternative to quitting. Compl. ¶¶ 86, 87, 89. The Complaint alleges that by marketing "light," "ultra-light," and "low tar/low nicotine" cigarettes, defendants reduced the incentive to quit smoking, and thus injured persons who would otherwise have done what was best for their health -- quit smoking. Compl. ¶¶ 90-91 (citing line from 1975 advertisement for True cigarettes: "I'd heard enough to make me decide one of two things: quit or smoke True. I smoke True."); see also Compl App. ¶¶ 36, 37, 39. Since there is no dispute that these products were sold and consumed throughout the United States, including the District of Columbia, it has been extensively alleged that consumers

of the products in the District suffered dangerous diseases and injuries as a result of defendants' fraud that was furthered by numerous acts committed in the District. See Section III.C(3).

Accordingly, tortious injury caused by overt acts in the District by BAT's co-conspirators is well pleaded.

Furthermore, jurisdiction over BAT is clearly based on "a claim for relief arising from acts" that the United States has enumerated in conjunction with jurisdiction under §13-423(a)(3). See § 13-423(b). For example, the United States has alleged that persons for whom the United States is authorized and required to furnish and pay for, hospital, medical, surgical, or dental care and treatment, have suffered and will suffer injury as a result of defendants' fraudulent conduct. Compl. ¶ 137. See Medical Care Recovery Act, 42 U.S.C.A. §§ 2651 et seq. Without question, the District of Columbia, situs of the federal government where a significant percentage of the federal work force is located, is a jurisdiction where the United States has paid for and furnished (and will pay for and furnish) a substantial amount of this care.

In short, it is undeniable that the allegations of the Complaint, if proven, will demonstrate that massive injury has occurred in the District as a result of defendants' conduct in the District. As the United States has adequately alleged the existence of a conspiracy; set forth facts describing BAT's participation in that conspiracy; and extensively alleged the commission of numerous overt acts by BAT's co-conspirators in the District in furtherance of the conspiracy that caused tortious injury in the District, BAT is subject to jurisdiction under §13-423(a)(3) of the D.C. long-arm statute.

# E. BAT Is Also Subject To Jurisdiction In The District Of Columbia Under Section 13-423(a)(4) Of The Long-Arm Statute.

Section 13-423(a)(4) of the District of Columbia long-arm statute provides that a court may exercise personal jurisdiction over one who acts "directly or by an agent" and "caus[es]

tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia." This court may assert jurisdiction over BAT under section 13-423(a)(4) of the District of Columbia long-arm statute because the United States has made a <u>prima facie</u> showing that 1) BAT committed acts outside the District of Columbia; 2) these acts caused tortious injury in the District of Columbia; and 3) BAT derives substantial revenue from goods used or consumed in the District of Columbia.

The United States has detailed numerous acts committed by BAT outside the District of Columbia that caused tortious injury in the District of Columbia. Those acts have been detailed in the Complaint, throughout this Memorandum, and in the attached Proffer to this Memorandum. They can be summarized as follows: BAT has long known of the addictive properties of cigarettes and engaged in efforts to enhance the addictive properties of nicotine, while publicly denying that cigarettes are addictive. See, e.g., Proffer at 11-13. To maintain the mythical "controversy" regarding smoking and health, BAT controlled and directed research regarding smoking, disease, and addiction. See, e.g., Proffer at 22-37. BAT suppressed the development, testing, and marketing of a less hazardous cigarette in order to minimize the liability of B&W in the United States. Proffer at 27-31.

Furthermore, BAT engaged in substantial tortious misconduct within the United States, outside the District of Columbia. From 1994 to 1996, it operated a cigarette factory in Reidsville, North Carolina, in order to maintain the viability of certain American Tobacco cigarette brands, which were sold throughout the nation, including in the District of Columbia, despite its knowledge that smoking these products would have hazardous health consequences to the consumer. Proffer at 55-58.

In committing these acts both in England and the United States, BAT fostered the false controversy regarding the health effects of smoking, deprived residents of the United States, including those in the District of Columbia, of vital health information, provided them with access to and encouraged them to use unreasonably dangerous products, and caused tortious injury to them. BAT imposed a conglomerate-wide policy suppressing research and public statements regarding smoking and health and enforced these requirements over each of its subsidiaries, and thereby directly prevented the release of truthful information about the health hazards of smoking. BAT boards and committees considered -- and approved -- various projects relating to the manufacture, design, and marketing of cigarettes, including those of its American subsidiary B&W. Proffer at 47-51. As outlined in the Complaint, see, e.g., Compl. ¶¶ 24-29 (Impact of Smoking on the American Public); Compl. ¶¶ 131-137 (Fraud), these actions injured members of the American public, including those in the District of Columbia.

Because BAT derives "substantial revenue" from the sale of cigarettes in this forum, it satisfies the remaining criterion of section 13-423(a)(4). Unquestionably, BAT has received billions of dollars from the sale of cigarettes in the United States over the last twenty five years. See, e.g. Ex. 151, 154, 155, 158, 164, 165, 166. Indeed, BAT receives dividends from its corporate affiliate, B&W, which indisputably sells cigarettes in the District of Columbia.<sup>20</sup>

As the Proffer demonstrates, <u>see</u> Proffer at II.C.2; III.C., BAT's instruction to suppress research, and its imposition of a "party line" on each of its subsidiaries, was motivated by a concern for its United States market (including, one must presume, the market in the District of Columbia) as well as potential liability in American courts.

BAT may not contend that receiving corporate dividends through its subsidiary is not the equivalent of "deriv[ing] substantial revenue from goods used or consumed" in the District of Columbia. First, BAT is the <u>sole</u> shareholder of B&W, not simply one of a number of investors in B&W. In any event, sales proceeds filtered back through corporate channels are sufficient to meet the literal requirements of this statute. The language of the provision does not require that the defendant be the seller or the manufacturer of the goods. As the court in Commonwealth of Massachusetts v. Philip Morris, Inc., No. 95-7378-J, 1998 WL 1181992, at \*6

Accordingly, through its activities outside the District of Columbia (both overseas and in the United States through its maintenance of the American Tobacco facility discussed in the Statement of Facts), BAT committed a series of tortious and unlawful acts that caused injury within the District of Columbia, and BAT has received, and continues to receive, substantial revenue from sales of cigarettes in the District of Columbia. Accordingly, jurisdiction under section 13-423(a)(4) is proper.

## IV. THIS COURT'S ASSERTION OF JURISDICTION OVER BAT SATISFIES DUE PROCESS.

The United States has alleged sufficient facts to demonstrate BAT's participation in the conspiracy by the tobacco industry and that assertion of jurisdiction is proper under the District of Columbia long-arm statute. The assertion of jurisdiction over BAT also comports with constitutional limitations.

The Due Process Clause of the Fourteenth Amendment protects individual liberty interests by limiting the exercise of personal jurisdiction over nonresident defendants. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 & n. 13 (1985); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 & n.10 (1982). Under the

<sup>(</sup>Mass. Super. Ct. Mar. 20, 1998) clarified, the "issue is whether a defendant 'derives substantial revenue from goods used or consumed ' in [the forum], not what role it has with respect to those goods." The court also stated that the question of whether BAT derived substantial revenue from goods used or consumed in the forum did not depend on corporate arrangements between BAT and B&W. The statutory language was satisfied if proceeds from sales in the forum made their way back to BAT. Any other interpretation of the language of this factor would ignore the "economic reality" that BAT derives substantial revenue from goods used or consumed in the forum. Id. at \*5-6 (citing Heins v. Wilhelm Loh Wetzler Optical Machinery GmbH & Co. KG., 26 Mass. App. Ct. 14, 20-21 (1988) (rejecting the argument of a West German optical machinery manufacturer that it was shielded from the attribution of revenue earned in Massachusetts by the existence of a Swiss "middleman" corporation which bought the optical machinery from it and then sold it in the U.S. through an Illinois distributor)).

Furthermore, section 13-423(a)(4) does not require a showing that the injury in the District resulted from or was directly related to any one of these three "plus" factors. <u>Gatewood</u> v. Fiat, S.p.A., 617 F.2d 820, 824 (D.C. Cir. 1980).

first prong or "minimum contacts" part of the due process test, the court inquires into whether the defendant has purposefully established sufficient minimum contacts with the forum state to justify the assertion of personal jurisdiction by its courts. Burger King Corp. 471 U.S. at 474. In assessing the sufficiency of a defendant's contacts with the forum, the court examines whether the defendant's conduct and connection with the forum are such that "[it] should reasonably anticipate being haled into court [there]." World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). It is not necessary for a defendant to be physically present in the forum as long as its actions were aimed at the forum, and the litigation arises out of or is related to those actions. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984). This means that there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958).

The second part of the due process inquiry assesses the "reasonableness" of exercising jurisdiction once "minimum contacts" have been established. See Asahi Metal Indus. v. Superior Court of California, 480 U.S. 102, 114 (1987). The reasonableness of exercising jurisdiction over a foreign nonresident defendant is analyzed under four factors: the burden on the defendant; the forum's interest in the litigation, the plaintiff's interest in obtaining convenient and effective relief; and the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the court. Id. at 113-15; see also Burger King Corp., 471 U.S. at 477; World Wide Volkswagen Corp., 444 U.S. at 292. Where, as here, jurisdiction is sought over a foreign defendant, the "Federal interest in Government's foreign relations policies" also may be a factor. Asahi, 480 U.S. at 115.

Both the "minimum contacts" and the "reasonableness" prongs of the due process analysis serve to ensure that jurisdiction comports with "traditional notions of fair play and

substantial justice." See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945);

Burger King Corp., 471 U.S. at 476-77. Thus, consideration of these elements should be done in tandem: "the stronger the showing as to one, the weaker the showing necessary to satisfy the other." Simon, 2000 WL 21114, at \*30 (citing Metropolitan Life Ins. Co. v. Robinson-Ceco Corp., 84 F.3d 560, 568 (1st Cir. 1996)). Consideration of reasonableness can sometimes establish jurisdiction on a lesser showing of minimum contacts than normally would be required. Burger King Corp., 471 U.S. at 477; Calder, 465 U.S. at 788-89. Likewise, where activities are purposefully directed towards the residents of a forum state, the defendants "must present a compelling case that the presence of other considerations would render jurisdiction unreasonable." Burger King Corp., 471 U.S. at 477.

In its Complaint and Proffer, the United States alleges three bases for finding that BAT had "minimum contacts" with the District of Columbia. First, because BAT engaged in a conspiracy with defendants whose jurisdiction in the District of Columbia is not contested, and at least one of them, as a co-conspirator (qua agent) of BAT committed an overt act in the District, this Court's exercise of jurisdiction over BAT comports with the minimum contacts prong of the Due Process requirement. Second, BAT's intentional acts outside the forum, including acts in furtherance of the conspiracy, that had substantial effects in the forum, themselves constitute minimum contacts. See Calder v. Jones, 465 U.S. 783, 788-90 (1984). Finally, BAT's maintenance of the assets of the Reidsville cigarette factory, formerly owned by American Tobacco, its maintenance of the viability of certain popular American cigarette brands (including those routinely sold in the District of Columbia) pursuant to an agreement with the United States Federal Trade Commission, and its assumption of existing product liability claims against American Tobacco, all evince significant contacts sufficient for jurisdiction to attach. See Proffer at IV.

Under conspiracy jurisdiction, the "purposeful availment" requirement is satisfied by showing that BAT chose to participate in the conspiracy with the other tobacco industry defendants with the knowledge that overt acts had been and would be committed by its coconspirators throughout the United States, including the District of Columbia, that would cause tortious injury in the District of Columbia. Thus, in Mandelkorn, the court required nonresident defendants to submit to suit in the District of Columbia, reasoning that while the nonresident defendants "personally had no direct contacts [in D.C.], their involvement in an allegedly wideranging conspiracy which [was] said to have caused injury in the District of Columbia [was a] sufficient nexus to this jurisdiction to require them to answer here for their roles in the alleged course of events." 359 F. Supp. at 696-97. Here, the Complaint sufficiently alleges that BAT conspired with the other defendants, knowing full well that these other defendants (and in particular its own subsidiary B&W) produced and marketed cigarettes for consumption in the District of Columbia. Additionally, as described above, BAT's direct role in maintaining both a factory and various brands from American Tobacco, and agreeing to assume its existing product liability claims, by their very nature indicate that BAT has "purposefully availed" itself of the protection--and the liability--of District of Columbia laws and courts.

. Using BAT's participation in the alleged conspiracy with the other tobacco industry defendants to satisfy "minimum contacts" is consistent with the Due Process Clause.

Jurisdiction based on BAT's role as a co-conspirator does not circumvent the requirement of a relationship between BAT and the forum. Rather, holding BAT responsible for the actions of its co-conspirators in the District of Columbia is entirely consistent with the general rule of attributing the acts of one conspirator within the scope of the conspiracy to the others, and quite consonant with § 13-423(a)'s attachment of jurisdiction to those who act "directly or by an agent." See Dooley, 786 F. Supp. at 79; see also Delgado v. Federal Bureau of Prisons, 727 F.

Supp. 24, 26-27 (D.D.C. 1989). Attributing the actions of co-conspirators within the forum to co-conspirators outside the forum to satisfy both the long-arm statute and the Due Process Clause is consistent with the agency relationship. <u>Id.</u>; see also <u>Ethanol Partners Accredited v. Wiener, Zuckerbrot, Weiss & Brecher</u>, 635 F. Supp. 15, 18 (E.D. Pa. 1985) ("When co-conspirators have sufficient contacts with the forum, so that due process would not be violated, it is imputed against the 'foreign' co-conspirators who allege that there is not sufficient contacts; co-conspirators are agents for each other.") (emphasis added).

Although the District of Columbia courts have not "attempt[ed] to address the limits on the use of the conspiracy theory to establish personal jurisdiction," see Edmond, 949 F.2d at 425, the courts have routinely applied the theory as one application of the long-arm statute. See also Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997) (applying test and concluding that plaintiff had not pled with particularity the conspiracy and overt acts in furtherance thereof); Edmond, 949 F.2d at 425 (trial court abused discretion in disallowing jurisdictional discovery where plaintiff had specifically alleged existence of conspiracy, defendant's participation in it, and injury-causing act of the conspiracy within the District of Columbia); Dooley, 786 F. Supp. at 78 (asserting jurisdiction under conspiracy theory where plaintiff sufficiently pleaded details of conspiracy); Mandelkorn, 359 F. Supp. at 697; Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144, 151 (D.D.C. 1976) (applying Mandelkorn test and ordering jurisdictional discovery).

Other jurisdictions recognize conspiracy-based jurisdiction as well. See, e.g., Hoffman, 268 F.2d at 295-96; Textor v. Board of Regents of Northern Illinois University, 711 F.2d 1387 (7th Cir. 1983) (accepting conspiracy theory under Illinois long-arm statute, Ill. Rev. Stat. 1981, ch. 110, para 17); Cameron v. Owens-Corning Fiberglass Corp., 695 N.E.2d 572 (Ill. App. Ct. 1998) (British investment holding company which had never possessed, sold, or distributed asbestos products or engaged in any part of the asbestos business; had conducted no business in Illinois; had never maintained offices, employees, or an agent for service of process, real estate, bank accounts, telephone numbers, contracts, or lawsuits in Illinois, and had never

Other courts have analyzed conspiracy-based jurisdiction based on state long-arm statutes and found that the theory comports with due process. For example, the Northern District of Illinois has determined that the conspiracy theory of personal jurisdiction satisfies the minimum contacts requirement of due process. Zivitz v. Greenburg, No. 98-C-5350, 1999 WL 984397, at \*5 (N.D. Ill. Oct. 25, 1999) (under the conspiracy theory of jurisdiction, nonresident defendants are deemed to have sufficient minimum contacts with Illinois if they participated in a conspiracy involving a substantial conspiratorial act in Illinois, that is a jurisdictional act sufficient to establish minimum contacts with and confer jurisdiction over nonresident defendant which committed the act); see also Cleft of the Rock Foundation v. Wilson, 992 F. Supp. 574, 584-85 (E.D.N.Y. 1998) (by joining conspiracy with knowledge that overt acts have taken place in forum, nonresident defendant purposefully avails himself of privilege of conducting activities within the forum and should reasonably anticipate being haled into court there). But cf. Kipperman v. McCone, 422 F. Supp. 860 (N.D. Cal. 1976).

As mentioned above, in addition to BAT's participation in the conspiracy, BAT established "minimum contacts" by engaging in intentional and purposeful acts that had the effect of defrauding, injuring, and addicting residents of the District of Columbia. The leading Supreme Court case to consider the constitutionality of asserting jurisdiction over nonresident defendants who commit intentional acts outside the forum that have effects in the forum is <a href="Calder v. Jones">Calder v. Jones</a>, 465 U.S. 783 (1984). In <a href="Calder,">Calder</a>, the Court held that a defendant should reasonably anticipate being haled into court in a forum, where it has purposefully directed its activity toward the forum and caused effects by its conduct in the forum, even if the defendant

paid taxes in Illinois, nevertheless subject to conspiracy jurisdiction), <u>cert. denied</u>, 119 S. Ct. 872 (1999); <u>Ghazoul v. International Management Servs.</u>, 398 F. Supp. 307 (S.D.N.Y. 1975) (finding threshold showing of conspiracy); <u>Professional Investors Life Ins. Co. v. Roussel</u>, 445 F. Supp. 687, 696 (D. Kan. 1978).

never physically enters the state. <u>Id.</u> at 788-90; <u>see also</u> Restatement (Second) of Conflict of Laws § 37 ("A state has the power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from those effects unless the nature of the effects and of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable.")

BAT seeks to evade the Supreme Court's holding in <u>Calder</u> by insisting that a D.C. court may not exercise jurisdiction over it unless the District of Columbia was "the focal point of the alleged extraterritorial tortious conduct." BAT Mem. at 12 n.5. This argument — essentially that the <u>Calder</u> test does not apply because BAT's intentional wrongdoing has been aimed at more than one state — does not withstand scrutiny.

The reasoning of the state court in Commonwealth of Massachusetts v. Philip Morris

Inc., No. 95-7378-J, 1998 WL 1181992 (Mass. Super. Ct. Mar. 20, 1998) is particularly
instructive. In the Commonwealth of Massachusetts case, upon similar facts, the court reasoned
that "[t]he fact that the alleged intentional wrong was directed at many states instead of just one
should not have the result that B.A.T Industries p.l.c. cannot be sued anywhere in the United
States. Calder does not suggest such a result. Rather, under Calder, the fact that B.A.T
Industries p.l.c. aimed its alleged wrongdoing at the entire United States gives it the requisite
'minimum contacts' with each state where that alleged wrongdoing caused injury." 1998 WL
1181992, at \*8. Similarly, in Cole v. The Tobacco Institute, 47 F. Supp.2d 812 (E.D. Tex.
1999), the district court rejected the identical argument made by BAT in that forum noting "[t]his
[Calder argument], however, goes against common sense. It implies that a party can avoid
liability by multiplying its wrongdoing." Id. at 815-16. On the contrary, "[w]here the wrongdoer is committing an intentional tort, and knows where the effects of that intentional tort will be felt, it does not offend due process to hale that wrongdoer into court in the places where he knew his

wrongdoing would cause injury." Id.

Other courts have similarly recognized that BAT may not escape jurisdiction because the effects of its actions were felt nationwide rather than in only one state. See Simon, 2000 WL 21114, at \*35; State of Maine v. Philip Morris Inc., No. CV-97-134, slip op. at 9 (Me. Super. Ct. Oct. 14, 1998) ("The fact that BAT's intentional conduct has been so vast as to encompass the entire country should not preclude jurisdiction in individual states such as Maine."); State of Washington v. American Tobacco Co., No. 96-2-15056-8-SEA, slip op. at 9-10 (Wash. Super. Ct. June 9, 1998).

As described in the Statement of Facts, <u>supra</u>, for the last 24 years BAT has engaged in extensive fraudulent and tortious activity involving misrepresentation, fraudulent concealment, and suppression of research. BAT perpetuated the "open controversy," knowing full well that the "controversy" was false, Proffer at II.C., and imposed this "party line" on its subsidiary companies by promulgating and enforcing its mandatory "Statement of Business Conduct." Proffer at 13-22, 41-42. BAT created its Compendium in order to engage in a campaign to undermine legitimate science, Proffer at 22-25. Concerned with the liability implications of having "disadvantageous" (i.e., truthful) research in its files, BAT arranged to insulate B&W from this information, in part by possibly removing BAT Group scientific research as "deadwood" files. Proffer at 33-37. Having committed these intentional torts, which caused extensive injury in the District of Columbia, it is both fair and eminently reasonable "to require them to answer here for their roles in the alleged course of events." Mandelkorn, 359 F. Supp. at 697; see also Simon, 2000 WL 21114, at \*35 ("Where intentional misconduct is at issue, the wrongdoer should reasonably anticipate being called to answer for its conduct wherever the results of that conduct are felt.").

Finally, all four Asahi factors indicate that this Court should assert jurisdiction. First,

BAT does not face any appreciable hardship by defending itself in the District of Columbia rather than in London, nor has it submitted any evidence to support such an assertion. This is not surprising, considering that "B.A.T is not some 'mom and pop' tobacco shop in the suburbs of London, but a billion dollar international enterprise." Simon, 2000 WL 21114, at \*35. It would be disingenuous for BAT to brag in its annual reports of its being "the world's most international cigarette company," the fifth largest corporate entity in the United Kingdom, and of its huge sales in North America, and then to complain to this court of an inability to defend itself in this forum. If BAT, despite its alien status, had the capability to participate in and benefit from a conspiracy in the United States that affected this forum, then it has the capability to answer in this forum for the fraud perpetrated and injuries caused by that conspiracy.

Second, the District of Columbia has a clear interest in the total resolution of related claims in one litigation against all participants in the alleged conspiracy. Most significantly, its resident, the United States, has a substantial interest in obtaining effective and convenient relief gin this forum. The federal fisc should not be burdened by forcing the United States to sue BAT abroad on the same theories and evidence when suit is properly brought in this forum against BAT's co-conspirators. See also 18 U.S.C. § 1965(a) (RICO action "against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.").

Third, the procedural and substantive policies of other nations whose interests are implicated by the exercise of jurisdiction over BAT in the United States, support the exercise of jurisdiction here. If an American corporation were implicated in large-scale tortious and fraudulent conduct of the type here alleged against BAT, there is every reason to think that many of the United States' trading partners would likely exercise jurisdiction over such a defendant.

See Simon, 2000 WL 21114, at \*36 (citing to cases and statutes from the United Kingdom,

France, and Japan, and the European Union). Furthermore, British corporations, including BAT, have often been subject to the jurisdiction of U.S. courts. <u>See BAT Exhs. FF-WW; Simon v. Philip Morris, Inc.</u>, No. 99CV1988, 2000 WL 21114 (E.D.N.Y. Jan. 4, 2000). Indeed, in this very action, BAT's subsidiary BATCo, another corporation organized under the laws of England and Wales, is not contesting jurisdiction in this matter.

Finally, the Court need not concern itself with the foreign policy implications of this suit, since it is the Executive Branch of the federal government which bears responsibility for conducting the foreign relations of the United States and which has brought this suit against BAT.

In sum, "traditional notions of fair play and substantial justice" do not prevent, but in fact warrant, this Court's assertion of personal jurisdiction over BAT.

# V. OTHER COURTS ACROSS THE COUNTRY HAVE RECOGNIZED THE SCOPE AND EXTENT OF BAT'S INVOLVEMENT IN THE CONSPIRACY.

Various courts across the country have exercised jurisdiction over BAT in cases where plaintiffs have alleged and proffered evidence of the same facts shown in the Complaint and Proffer. For example, in Simon v. Philip Morris, Inc., No. 99CV1988, 2000 WL 21114 (E.D.N.Y. Jan. 4, 2000), Judge Weinstein denied BAT's motion to dismiss for lack of personal jurisdiction after examining the plaintiff's proffer, along with its accompanying exhibits. The court concluded that there was abundant evidence of a tobacco industry conspiracy to manufacture hazardous products and to deceive American consumers about the deleterious health effects of using them, id. at \*4-10, and that BAT engaged in extensive tortious, fraudulent, and otherwise unlawful overt acts in furtherance of this conspiracy. Id. at \*11-22.

Courts' bases for exercising jurisdiction and BAT's involvement in a conspiracy have been premised upon several actions. First, courts have found that BAT perpetuated a false

"controversy" regarding smoking and health, as well as its intra-company "enforcement" of the same. 2000 WL 21114, at \*11-17.<sup>22</sup> Courts have also found that BAT suppressed the development of a safer cigarette. 2000 WL 21114, at \*17-18; State of Washington v. American Tobacco Co., No. 96-2-15056-8-SEA, slip op. at 8 (Wash. Super. Ct. Wash. June 9, 1998). Furthermore, courts have determined that BAT was involved in the manipulation of nicotine delivery research, including its prioritization of the development of Y-1 tobacco, a genetically-engineered high nicotine plant, as well as ammonia processing to improve nicotine transfer, 2000 WL 21114, at \*18-20<sup>23</sup>, and that BAT had acted in concert with its subsidiary, B&W, to prevent and conceal damaging (truthful) smoking and health information generated by the BAT Group companies. 2000 WL 21114, at \*22; Small, 672 N.Y.S.2d at 607 (allegations that BAT hid damaging documents and information to avoid litigation in the United States). In addition, courts have concluded that BAT extensively participated in the marketing, research, and

See also Cole v. The Tobacco Institute, 47 F. Supp.2d 812, 816-17 (E.D. Tex. 1999) ("Further evidence that B.A.T. Industries p.l.c. employed its subsidiaries to perpetuate fraud is the fact that it included regularly in its Statements of Business Conduct that all subsidiaries were to deny that any scientific causation existed between smoking and disease . . . when evidence dating back to the 1950's had established precisely the opposite") (referring to BAT Statement of Business Conduct); Commonwealth of Massachusetts v. Philip Morris, Inc., No. 95-7378-J, 1998 WL 1181992, at \*2 (Mass. Super. Ct. Mar. 20, 1998) (smoking and health and industry's response to allegations about dangers of its products were discussed regularly at Chairman's Advisory Conferences and TSRT meetings); id. at 7 ("TSRT became another forum in which the Chairman communicated the [BAT] official position that there was a lack of scientific evidence linking smoking to disease" . . . "it is reasonable to infer that the same message was refined, repeated and reinforced at the numerous TSRT meetings and Chairman's Advisory Conferences devoted to the same problem."); Rossello v. Brown & Williamson Tobacco Corp., No. 97-1910, slip op. at 25 (D.P.R. June 2, 1998) ("TSRT alone demonstrates the parent companies' active roles in the fraud alleged by Plaintiffs.").

See also Small v. Lorillard Tobacco Co., 672 N.Y.S.2d 601, 607 (Sup. Ct. 1997) ("[BAT's] motion papers acknowledge that the BAT board of directors and senior officers established coordinated policies and procedures on tobacco research, marketing, and public relations that applied to all BAT subsidiaries."), dismissed on other grounds, 679 N.Y.S.2d 593, 606 (Sup. Ct. 1998) (dismissing case in its entirety for failure to state a claim, but agreeing with trial court's assertion of jurisdiction over BAT), aff'd, 720 N.E.2d 892 (N.Y. 1999).

development of cigarettes. 2000 WL 21114, at \*22 (documents "suggest comprehensive involvement and intervention by BAT").

Noting that the plaintiff in Simon had properly alleged a conspiracy which was connected to the forum, the court held that BAT's participation in the conspiracy made it subject to jurisdiction in New York under the state long-arm statute, based on the New York acts of its co-conspirators, including B&W. <u>Id.</u> at \*27.<sup>24</sup> The district court reasoned that the exercise of jurisdiction would be quite consistent with Due Process limits, as BAT had "purposeful[ly] avail[ed]" itself of the forum by joining in a conspiracy that had contacts with New York, and that its intentional tortious acts causing in-state effects were sufficient to confer jurisdiction. <u>Id.</u> at \*31-37. Furthermore, the court determined that exercising jurisdiction would be eminently reasonable because "BAT is not some 'mom and pop' tobacco shop in the suburbs of London, but a multibillion dollar international enterprise," and the forum "has a decided interest in a total resolution of related claims in one litigation against this defendant and related defendants." <u>Id.</u> at \*35.

Courts exercise personal jurisdiction where (1) the particular state long-arm statute allows a conspiracy theory of jurisdiction; and (2) where the plaintiff has properly alleged the existence of a conspiracy, the defendant's participation therein, and overt acts committed within the forum. Under the long-arm statute of the District of Columbia, the United States' allegations, coupled with considerations of fairness and due process, support denial of defendant BAT's motion to dismiss for lack of personal jurisdiction.

#### **CONCLUSION**

Additionally, the court in <u>Simon</u> found that substantial evidence existed that BAT had committed out-of-state tortious acts causing injury within the state, could reasonably expect that such acts would cause in-state injury, and had earned substantial revenue in New York subjecting it to jurisdiction under another section of the New York long-arm statute.

For the reasons stated herein, this Court should exercise personal jurisdiction over BAT and deny BAT's motion to dismiss. If this Court were to conclude that the exercise of jurisdiction over BAT hinges upon the resolution of disputed facts, the Court should defer ruling and permit discovery to proceed against BAT.

### Respectfully submitted,

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February 25, 2000